BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSAURA RAMIREZ	)	
Claimant	)	
	)	
VS.	)	
	)	
MCDONALD'S RESTAURANT	)	
Respondent	)	Docket No. **1,061,646**
	)	
AND	)	
	)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 22, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated October 23, 2012, the discovery deposition of Rosaura Ramirez, dated September 20, 2012, and all pleadings contained in the administrative file.

The ALJ found:

> Although the claimant was seen by a number of physicians in 2011 and early 2012, not one of them specifically told the claimant that the problem with her hands was work related. However, on June 26, 2012, the claimant gave respondent notice, and the date of injury therefore is no earlier than June 26, 2012.[1]

[1] ALJ Order (Mar. 22, 2013) at 3.

ISSUES

Respondent requests review of whether or not claimant gave timely notice of her carpal tunnel complaints. Respondent argues claimant sought treatment on her own in April and May, 2012, which occurred over 20 days before June 26, 2012; therefore claimant failed to give timely notice of her repetitive trauma.

Claimant argues that Omar Casada, respondent's duly authorized agent, had notice of her injury, and therefore the ALJ's Order should be affirmed.

The sole issue raised on review is whether or not claimant gave timely notice of her injury by accident or repetitive trauma.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was employed by respondent as a crew member at a Wichita location in January 2009. Her job duties included cooking on the grill and sandwich preparation. Claimant testified she was unaware as to which position she would fill during a shift until she arrived for work. When assigned a position for a shift, either cooking on the grill or sandwich preparation, claimant stated she would work in that position for the entirety of her shift.

Claimant first sought treatment for the pain, numbness and tingling in her hands at Galichia Heart Hospital emergency room on March 11, 2011, where she was prescribed prednisone and muscle relaxants. She was advised to follow up with her family doctor if there was no improvement.

On March 14, 2011, claimant followed up at the Hunter Health Clinic with complaints in both hands. Claimant was advised to wear wrist splints, especially at night, and to follow up if symptoms increased. Claimant was educated about carpal tunnel at that time. She continued to work at respondent performing her regular job duties.

Claimant was next seen at the Hunter Health clinic by Dr. James Seberger on April 11, 2012. Claimant attended an appointment regarding her weight loss program when she informed Dr. Seberger of the pain in her hands. She complained of pain in her hands and wrists and told Dr. Seberger she believed she had carpal tunnel syndrome. The doctor recommended claimant take ibuprofen before and after her work shift. He additionally

advised claimant "that it would be best to change her jobs, if that was at all possible, and . . . see if these changes can be made before seeking surgical consult."[2]

After the appointment, Claimant talked to her assistant manager, Omar Casada, about her visit with Dr. Seberger. Claimant testified:

> Q. Once you left Dr. Seberger's office, did you talk to Omar about your doctor's appointment?
>
> A. Not about the weight loss.
>
> Q. But did you talk about the hand situation?
>
> A. I did talk about the hands.
>
> Q. And just very briefly, what did you two talk about regarding your hands?
>
> A. I told him I was feeling pain, numbness, tingling.
>
> Q. Did you discuss with him about changing jobs like Dr. Seberger had recommended to you?
>
> A. Yes, I talked to him and he would help me as far as changing my tasks away from the grill or cooking.[3]

Claimant stated, in her opinion, the process of cooking on the grill caused her the most problems. Mr. Casada removed claimant from the grill for a period of time, and claimant testified her hands were less swollen as a result.

Claimant attended an appointment on May 16, 2012, with Dr. Paula Worley at Grace Med due to increased pain in both hands and arms. Claimant was assessed with carpal tunnel syndrome and prescribed prednisone for the pain. She returned to using her wrist braces at night. Dr. Worley suggested claimant change her job at work to "give her a rest from the repetitive motion."[4] At the time of her appointment, claimant was again cooking on the grill.

After the appointment of May 16, 2012, claimant informed Mr. Casada of her hand pain, numbness, and swelling. Mr. Casada reassigned claimant from the grill for three or four weeks.

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[2] P.H. Trans., Cl. Ex. 2 at 4.

[3] P.H. Trans. at 12-13.

[4] P.H. Trans., Cl. Ex. 2 at 23.

On June 26, 2012, claimant advised Mr. Casada that the pain in her hands was constant. She asked Mr. Casada if it would be possible for her to see a doctor. Mr. Casada was unsure at that time and needed to ask his superiors. Claimant worked her regular shift throughout that day until Mr. Casada summoned her to his office, where she assisted him to fill out a form. Claimant testified she was unsure as to whether the form was a workers compensation report.

Claimant saw Dr. John Estivo on September 6, 2012, at respondent's request. Dr. Estivo placed restrictions on claimant in that she could continue to work but was not to use constant repetitive motions with her hands. He ordered nerve conduction tests and an EMG through Dr. Blake Veenis. On September 18, 2012, Dr. Veenis found claimant's overall results were abnormal, consistent with a low moderate to moderate carpal tunnel syndrome in both hands.

Claimant followed up with Dr. Estivo on September 26, 2012, where she received an injection to her left carpal tunnel. Dr. Estivo recommended she continue to wear wrist splints at night and take ibuprofen for pain. He allowed claimant to continue working with temporary restrictions of no constant repetitive use of both hands.

As of the preliminary hearing, claimant was still working for respondent.

Claimant testified on cross examination as follows:

> Q. All right. These conversations then that you had with Omar that you have testified to today about were not conversations where you said something to your employer about having problems with your hands?
>
> A. I did tell him; I just never specifically asked to be sent to the doctor.
>
> Q. Did you tell him that you thought the hand problem was related to your work before June 26th?
>
> A. Yes.
>
> . . .
>
> Q. When you had these conversations with Omar before June 26th, were you describing these symptoms that you were having with your hands?
>
> A. Yes.
>
> Q. And did you specifically tell him that you thought that this condition in your hands was related to your work activities?

A. I don't remember what I said specifically, but I know I talked to him about my hands.[5]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b) and (c) provides:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(e) provides:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

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[5] P.H. Trans. at 17-19.

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520(a) provides:

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was

> unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

ANALYSIS

In order to determine whether claimant provided timely notice of an injury by repetitive trauma, this Board member must first determine the date of accident. The ALJ found that the date of accident was a series through June 26, 2012. This Board member disagrees.

On April 11, 2012, Claimant saw Dr. Seberger for, inter alia, complaints of pain in her hands and wrists. The written record contains a history of claimant's work activities. Dr. Seberger states, "I advised her that it would be best to change her jobs ..."[8] In addition to Dr. Seberger's written recommendation, claimant testified that she had a conversation with Dr. Seberger about changing jobs because of her hand condition.

As a result of her conversation with Dr. Seberger, claimant talked to Omar about the numbness and tingling in her hands, and her need to change jobs. Omar then took Claimant off the grill position. Claimant's testimony leaves no doubt that on April 11, 2012, claimant was advised by Dr. Seberger that she suffered from a work-related medical condition. The fact that claimant's supervisor changed her job duties to reduce her hand pain supports a finding that respondent knew claimant had a work-related hand condition.

K.S.A. 2011 Supp. 44-508(e) is clear in its statement of what is deemed to be the date of accident in a claim where the injury is caused by repetitive trauma. In this claim, at least two provisions of the statute apply simultaneously. Subsection (e)(2) provides that the date of accident is the date an employee is placed on modified or restricted duty. Dr. Seberger recommended modified duty on April 11, 2012. Subsection (e)(3) (3) provides

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[6] K.S.A. 44-534a.

[7] K.S.A. 2012 Supp. 44-555c(k).

[8] P.H. Trans., Cl. Ex. 2 at 4.

that the date of accident is the date the employee is advised by a physician that the condition is work-related. This event also occurred on April 11, 2012. As such, this Board member finds that the date of accident in this claim is April 11, 2012.

K.S.A. 2011 Supp. 44-520(a)(1)(A) requires an injured worker to provide notice within 30 calendar days from the date of injury by repetitive trauma. K.S.A. 2011 Supp. 44-520(b)(1) provides that the notice requirements in subsection (a) are waived if the employer or the employer's duly authorized agent had actual knowledge of the injury. In this case, the claimant testified that when she left her appointment with Dr. Seberger on April 11, 2012, she talked to Omar about the medical visit. She stated that she talked to Omar about her hand pain, numbness and tingling. As a result of the conversation, Omar changed claimant's work position.

Our Supreme Court interpreted the notice requirement, as articulated in a prior version of K.S.A. 44-520 containing similar language, as follows:

> The statute does not require that the notice be given by the workman personally, and it is sufficient if the giving of the notice is naturally prompted by consideration of the injury and the relationship between the workman and his employer. A reference to the injury in casual conversation would not be notice, but the notice need not be in writing, and need not have the definiteness and certainty of detail of a common-law indictment for crime.... Whether an injury may prove to be compensable may not be presently known, and what the statute contemplates is notice of injury, so that the employer may have fair opportunity to investigate the cause and observe the consequences.[9]

The Court in *Brackett* ultimately did not address the facts supporting actual notice of an injury based upon conversations that the claimant had with her supervisor, by finding a later date of accident that coincided with the filing of an Application for Hearing.

In this case, claimant had a conversation with her supervisor about her work activities causing pain, numbness and tingling in her hands. As a result of that conversation on April 11, 2012, claimant's supervisor changed her job duties to accommodate her complaints of pain. Certainly, this was more than a casual conversation about claimant's hand complaints. Respondent had actual knowledge of Claimant's work-related injury on April 11, 2012.

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[9] *Brackett v. Dynamic Education Systems*, No. 108,134, 297 P.3d 1194 (Kansas Court of Appeals unpublished opinion filed March 29, 2013), citing *Davis v. Skelly Oil Co.*, 135 Kan. 249, 251, 10 P.2d 25 (1932).

CONCLUSION

Based upon the foregoing, this Board member finds that claimant suffered an injury by repetitive trauma on April 11, 2012, and that respondent had actual knowledge of her injury.

WHEREFORE, the undersigned Board Member finds that the March 22, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is modified to reflect a date of accident of April 11, 2012. The Order is affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
HONORABLE SETH G.VALERIUS
BOARD MEMBER

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